



What is a Prenuptial Agreement?

A prenuptial or premarital agreement (also known colloquially as a "prenup") is a legal document that sets forth the division of Separate Property (also called Non-Marital Property) and Marital Property in the event of a separation, divorce, or the death of one partner in the marriage.

What Does a Prenuptial Agreement Cover?

In general, premarital agreements cover: the following

- **Division of Property:** defines the distribution of Marital Property accumulated during the marriage, such as real estate or other assets, or separate Property either partner possessed before the marriage.
- **Spousal support:** covers spousal maintenance/alimony payments by one partner to another, often when one spouse is the primary earner or significantly wealthier than the other.

A prenuptial agreement is also helpful in defining a spouse's responsibilities to the other's estate, whether that means waiving their "Right of Election" (taking a share of the deceased partner's estate willed to the surviving partner) or being allowed to keep it under state law.

What a Prenuptial Agreement Cannot Cover

- **Child Custody:** The law is very specific in that you cannot sign a prenuptial agreement contracting away the rights of your future children. For example, if you pass away, your custodial rights revert to the grandparents, and if you divorce, one of the parties automatically has custody of the child/children.
- **Child Support:** The law is also very specific that you cannot sign a prenuptial contracting away child support for future child/children.

What are the Reasons for a Prenuptial Agreement?

A prenuptial agreement sets forth how finances would be divided if a couple were to divorce, therefore managing expectations and avoiding costly legal battles.

In addition, a prenup can be helpful to:

- Force couples to sit down and talk about their finances (assets AND liabilities) before they get married. They can discuss what they are bringing into the marriage and get to know each other's position sharing. i.e., do the partners believe "what's mine is yours, what's yours is mine," or do they have a different outlook?

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- Protect a partner coming into the marriage with substantially more assets, or provided that in the prenuptial, the parties agree to divide those assets/income in a manner that is more favorable to the wealthier partner than if they followed state "Equitable Distribution" laws.
- Clarify what happens to debt accumulated before the marriage, i.e., that the new spouse is not responsible for the premarital debt. (Additional steps may also be necessary so that there is no comingling of debt during the marriage.)
- Define what happens to assets either party might inherit during the marriage.
- Determine future maintenance payments or if there will be no maintenance payments if the couple divorces.
- Outline obligations to other parties, such as children from a prior relationship or other relatives, and codify that both were aware of these obligations at the time of marriage. These obligations can be both financial and custodial.

Requirements of a Valid New York Prenuptial Agreement

Under New York law, prenuptial agreements are entered into before the marriage and take effect as soon as the couple becomes officially married. The document must be written, both partners must sign it, and it must be witnessed by a notary public. The Court will not accept unsigned or oral prenuptial agreements.

Both parties must agree willingly and fully know what they agree to. If one spouse signed the Agreement under duress, was not deemed competent, was under 18 (a minor), or if the Agreement were unconscionable at the time (meaning unfair by legal standards), it would not be considered valid. Furthermore, if either of the parties withheld crucial information at the time of signing, the entire prenuptial might be deemed invalid.

Therefore, it is essential that the prenuptial includes a Personal Financial Statement (PFS) for each party with FULL DISCLOSURE. Having a complete and accurate PFS will help diminish the chances of a successful claim at a later date that the prenuptial Agreement is invalid.

It is also advisable that both parties have legal representation. This avoids a claim at a later date that one person was taken advantage of.

What is a Marital Asset or Property?

New York statute defines marital assets as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held."

Therefore, Marital Assets include cash, securities, bank accounts, retirement accounts, and pensions acquired during the marriage; Advanced educational degrees and permits to engage in specialized businesses acquired during the marriage; Gifts to each other.

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Here are some less obvious examples:

- A house purchased during the marriage would be a Marital Asset, even if titled in only one person's name.
- Credit card bills incurred during the marriage, even if the purchases only "benefited" one party, would be a Marital Debt.
- The cost of gifts purchased for friends and given away during the marriage, even if the gifts only were decided by one person, would be a Marital Expense, and if they resulted in debt, they would be a Marital Debt.

What is a Non-Marital Asset, aka Separate Property?

A Non-Marital, aka Separate Property, consists of assets acquired before the marriage, during any legal period of separation, and certain specific types of Property acquired during the marriage which were NOT comingled.

Common examples of a Non-Marital Asset (Separate Property) include:

- Real or Personal Property, either spouse owned or obtained before the marriage;
- The Property you received during the marriage via a gift from a third party or inheritance, provided that the Property was not comingled with other marital funds.
- Personal injury compensation (not related to loss of wages or earning capacity) for an injury during the marriage, provided that the payments were not comingled with other marital funds.
- Assets acquired during the marriage but paid for with Separate Property, provided that neither the separate property nor the newly acquired property was ever comingled with marital funds.
- Assets acquired during the marriage using only Separate Property, provided that neither the separate Property nor the acquired Property was comingled at any time with other marital funds.
- Increases in the value of the separate Property, except in cases where the increase was due to a spousal contribution;
- Property is explicitly described as Non-Marital/ Separate in a written agreement between spouses, such as a prenuptial or postnuptial agreement.

The laws about Non-Marital Assets are complicated and often challenged during a divorce proceeding. If there are changes to the titles of Non-Marital Assets during the marriage, it can be hard to prove they should be considered Separate Property.

It thus is a bad idea to:

- Add funds to Non-Marital Assets during the marriage unless you have clear documentation that the added funds came from other Non-Marital Assets.
- Change the title of any Non-Marital Asset to joint names.
- Use the Non-Marital Assets to support the marital lifestyle. For example, if you had real estate before you got married and then lived in it with your spouse and made improvements to it during the marriage from Marital funds, it would be hard to claim it remained a Non-Marital Asset.

Maintaining records to support a claim that an asset is Non-Marital Property is especially challenging when asset ownership goes back decades. Accurate documentation is critical.

Does a Prenuptial Agreement Help Protect Separate Assets?

A prenuptial agreement can help protect separate assets by defining them in the Agreement and specifying that both parties agree they are not subject to equitable distribution in a divorce. However, vigilance is needed not to commingle those assets with Marital assets. If they are commingled or transmuted, they may lose their status as a separate asset.

What is Commingling or Transmutation of Property?

Commingling of assets occurs when a Marital asset is mixed in with a Non-Marital asset.

Examples:

- A client has funds in a bank account before the marriage and then begins depositing funds earned during the marriage into that account.
- A spouse receives an inheritance or a gift during the marriage and commingles the inherited or gifted funds with marital funds acquired during the marriage. In those situations, the Separate Property can lose the quality of being non-marital, meaning that the commingled funds might be deemed Marital Property and divided by the Court at the time of divorce.

To ensure that non-marital assets will not be deemed marital Property at the time of divorce, the best course of action is to keep them separate during the marriage by maintaining a separate bank account. It is also prudent to execute a prenuptial agreement before the marriage identifying which Property will remain non-marital at the time of divorce.

Retaining documentation is vital to prove that an asset is separate at the time of divorce. Account statements are frequently used to prove that funds in an account are a spouse's non-marital assets. If you have non-marital assets that you want to remain your separate Property, hold on to those old account statements establishing how and when you acquired the assets because they might not be available from banks or other financial institutions 10, 20, or 30 years later when you are getting divorced. It might also be necessary to employ a forensic expert to prove that the assets are non-marital.

What will it cost?

Expect that a prenuptial agreement, where both parties are aligned on the key issues, will cost \$1,500 to \$3,000 per attorney. This should cover an initial meeting to understand your concerns, draft an agreement, and negotiate key points with your fiancée's attorney so that you arrive at a document that meets both parties' concerns.

Is it too Late to Create a Prenuptial Agreement?

Both partners must sign a valid prenuptial agreement prior to being married, and a notary public must witness their signatures.

However, if you are already married and still wish to have the same legal protection offered by a prenuptial agreement, it is still possible to draft and sign a postnuptial agreement. The

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documents are substantially similar, but different rules apply to a postnuptial agreement than a prenuptial, especially if a divorce or separation is imminent and separate attorneys for each spouse are involved.

A common use of a postnuptial agreement would be if a substantial asset were being purchased with "separate funds" and that person wanted to document that the new asset would remain separate Property in the event of a divorce.

Does New York State require you to leave assets to your spouse? Can that be changed through a prenuptial or postnuptial agreement?

Under New York law, a spouse legally married to a decedent at their death has a right to inherit an "elective" share of the assets.

- The surviving spouse is entitled to the entire estate if the decedent dies without a will and children.
- If there is no Will, but there are surviving children, the surviving spouse is entitled to the first \$50,000 in assets and one-half of the remainder of the estate.

If the decedent dies with a Will, and the Will intentionally excludes the spouse, the surviving spouse can contest the Will. One way to minimize the chances of a Will challenge is to enter a Prenuptial or Postnuptial Agreement where the spouse gives up their right to an inheritance.

How many years is a prenuptial agreement good for?

In general, **prenuptial agreements do not expire**. They're designed to go into effect should your marriage end by divorce or death. There are no expiration dates on prenups regardless of the state they're written in, where you get married, or where you end up living.

If there is no pre or post-nuptial agreement, what issues must be resolved in a divorce?

- Division of Property and Debt
- Alimony aka Maintenance

In addition, Child Support and Child Custody are decided when couples divorce, but these are not issues dealt with in a pre or post-nuptial agreement.

If there is no prenuptial agreement, what factors enter into the Court's decision in the division of property/debt and awarding maintenance?

- Each spouse's income and Property at the time of the marriage
- Each spouse's income and Property at the time of the divorce.
- The length of the marriage.
- The need for the custodial parent to occupy the marital home and use its contents to raise the children
- Direct or Indirect contributions of each party towards establishing Marital Assets or Debt.
- Each spouse's age, health, and current income,
- Each spouse's future potential earnings, financial circumstances, and Property.
- Lifestyle during the marriage

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- The liquidity of Marital Assets
- The loss of inheritance and pension rights upon dissolution of the marriage.
- The difficulty of evaluating any asset, business, or profession and the desirability of retaining it intact and free from interference.
- The Tax consequences of liquidating any Marital Asset or other selling costs.
- The wasteful dissipation of assets by either spouse
- Whether any assets were transferred or encumbered just before the divorce action was started.

A factor NOT considered is who did wrong. In general, the issue of who did wrong in a marriage is not appropriate for a court to consider. An exception is if the fault is absolutely shocking to the Court, such as attempted murder. On the other hand, a judge may consider economic fault, meaning the taking of actions that hurt the economic partnership between spouses.

VOCABULARY

Marital Asset

Non-Marital Asset or Separate Property

Alimony and Maintenance

Child Support

Personal Financial Statement Asset – Liability – Net Worth

Commingling or Transmutation

Community Property

Equitable Distribution

Defendant

Plaintiff

Claim

SOURCE: This handout is a conglomeration of information from various websites. You may wish to consult the sources listed below:

<https://www.tullylegal.com/resources/articles/what-are-the-requirements-for-prenuptial-agreements-in-new-york/>

<https://www.dhirschberglaw.com/blog/2020/october/how-does-separate-property-become-commingled-/>

<https://offitkurman.com/blog/2022/05/16/avoid-the-common-mistake-of-commingling-assets/>

<https://www.ricafortelaw.com/blog/spousal-disinheritance-under-new-york-laws.cfm>